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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GILBERT J. ARENAS, JR., an individual,

Plaintiff,

v.

SHED MEDIA US INC., a Delaware corporation; LAURA GOVAN, an individual; and DOES 1 through 10, inclusive,

Defendants.

Case No. LACV11-5279 DMG (MRWX)

DEFENDANT SHED MEDIA US INC.'S

- (1) **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION;**
- (2) **DECLARATION OF SCOTT ACORD;**
- (3) **DECLARATION OF ALEX DEMYANENKO;**
- (4) **DECLARATION OF DANIEL D. HELBERG; AND**
- (5) **DECLARATION OF VALERIE E. ALTER**

Hearing Date: August 22, 2011
Time: 9:30
Courtroom: 7

[Complaint Filed: June 23, 2011]

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I. INTRODUCTION

2 Plaintiff has filed a motion for preliminary injunction seeking to enjoin the
3 Show, set to air for the first time on August 29, 2011. Plaintiff claims that the name
4 of the Show—*Basketball Wives: Los Angeles*—combined with the fact that his ex-
5 girlfriend, Govan, will appear thereon, infringes his rights in his name and likeness
6 and infringes his unregistered trademarks therein. In other words, Plaintiff blindly
7 seeks to enjoin Shed Media from broadcasting the Show based on its title. Plaintiff
8 Gilbert J. Arenas, Jr. ("Plaintiff"), a self-described "famous" professional basketball
9 player, claims that because he is famous, his ex-girlfriend, Defendant Laura Govan
10 ("Govan") is not allowed to talk about her life. Plaintiff is wrong. Plaintiff's motion
11 must fail for at least 3 reasons: (1) Plaintiff cannot establish any injury, let alone
12 irreparable harm, (2) Plaintiff cannot establish that he will likely succeed on the
13 merits because, among other things, his claims in their entirety are barred by the
14 First Amendment, and (3) the balance of the hardships favors Shed Media.

15 More specifically, Defendant Shed Media US Inc. ("Shed Media") produces
16 *Basketball Wives*, a reality television series that follows the lives of women who are
17 or have been romantically attached to professional basketball players. The series is
18 not about basketball, let alone basketball players. Rather, the series focuses on the
19 women's lives and their relationships with one another, as well as their careers,
20 personal lives, and how they have been affected by their romantic connections—past
21 or present—to professional basketball players. Given the immense popularity of
22 and public interest in the series—3.5 million people tuned into the premier of its
23 third season, more than 250,000 people follow the series on Twitter, and more than
24 350,000 people "like" the series on Facebook—Shed Media is producing a spinoff,
25 *Basketball Wives: Los Angeles* (the "Show"), which has not yet aired.

26 As to both injury and irreparable harm, the thrust of Plaintiff's motion is that
27 the Show will result in monetary injury to him because "such a disreputable show
28 will lessen Plaintiff's reputation for something that is otherwise completely

1 unrelated to Plaintiff." [Motion 9:22-24.] However, Plaintiff admits that the
 2 advertising and promotion of the Show as of the date that he filed his Complaint had
 3 not so much as mentioned his name. The Show has not aired, so it could not
 4 possibly have used his name or likeness on the Show at this point.

5 In fact, Plaintiff himself is the only party who has been using his name in
 6 connection with the Show. More specifically, Plaintiff stated the following on
 7 Twitter on June 26, 2011:

- 8 • "for everybody talkin about my BM [Govan] on that tv show..i dont
 9 care what she does..if she gets a job i play less money to her(SMART
 10 THINKER HERE)"
- 11 • "most players dont know that.. 1 they cant lie about u on tv u can sue
 12 the show 2 if they hav a job it lowers ur pay...so let them work"

13 In other words, Plaintiff has used his identity in connection with the Show.
 14 Moreover, Plaintiff stated that he does not care—and in fact, that it is helpful to him
 15 financially—that Govan will appear on the Show. Plaintiff further acknowledges
 16 the damning nature of this evidence: ***Plaintiff removed these statements*** (and some
 17 of the statements described below) from his Twitter account around the time that he
 18 filed this motion. Thus, he cannot possibly claim that any mention of his name in
 19 connection with the Show results in damage to him.

20 Furthermore, Plaintiff cannot claim that the Show will affect his reputation
 21 because it involves "cat fights" and "infidelity issues." [Motion 9:20-24.] Among
 22 other things, Plaintiff has described his masturbatory habits on Twitter, and has
 23 published a photo of himself looking under a stall in the ladies' room for the world
 24 to see with the caption "I know what ur thinkn..but I dropped my phone.."excuse me
 25 Ms but can u kick me my phone"hahaha" and a photo of a woman posed to look like
 26 a penis as his Twitter icon; this latter photo has the superimposed title: "Women are
 27 Dicks." (Alter Decl., ¶¶ 15, 16, Exs. U, V and T). It is a well-known fact that
 28 Plaintiff is also a convicted felon for threatening a teammate he owed money to with

1 a gun in the locker room. Thus, the Show could not possibly have a negative impact
2 on Plaintiff's reputation.

3 As to the merits, Plaintiff's claims fails because, among other reasons, they
4 are barred by the First Amendment. Plaintiff claims that he is so famous and
5 important that simply mentioning the words "basketball wives" in the same sentence
6 as Govan's name—even without mentioning Plaintiff's name—violates his rights.
7 Plaintiff is wrong. Govan has a constitutional right to tell *her* story, even were it to
8 result in an unauthorized biography of Plaintiff. *Matthews v. Wozencraft*, 15 F.3d
9 432 (5th Cir. 1994) (plaintiff's right of publicity did not override the right of his ex-
10 wife and ex-police partner to tell the story of their undercover work and ultimate fall
11 from grace into drug use and penury).

12 Moreover, a public figure's right of publicity and trademark infringement
13 claims must fail when he or she brings a claim based on (1) a publication in the
14 public interest or (2) an expressive work, unless he or she can prove by clear and
15 convincing evidence that the defendant acted with actual malice and created a false
16 impression that the plaintiff endorsed the work. Here, the Show and any advertising
17 related thereto is constitutionally protected. No reasonable person could find that
18 the Show or any advertising related thereto falsely suggests that Plaintiff endorses
19 the Show. Plaintiff has not appeared in the Show or in its advertising, and as of the
20 dates that his Complaint and the motion for preliminary injunction were filed,
21 Plaintiff has not even been mentioned. No reasonable person would assume that the
22 Show relates to him, let alone that he endorses it.

23 This is especially true because Plaintiff's relationship with Govan deteriorated
24 publicly. Govan's lawsuit for child support was heavily publicized, and Arenas
25 bashed her it twitter, interviews and on the radio. Against this backdrop, anyone
26 who knew to associate Plaintiff with Govan would also know that she and Plaintiff
27 broke up and that her appearance does not suggest any endorsement by him—quite

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1 the opposite. Plaintiff's claims fail because he cannot prove that Shed Media
 2 created a false impression that he endorses the Show.

3 Finally, the balance of the hardships favors Shed Media. Plaintiff has
 4 admitted that the Show will benefit—not harm—him. By contrast, enjoining the
 5 Show will result in severe harm to Shed Media. If the Show is enjoined, Shed
 6 Media would likely be in breach of its production agreement, resulting in monetary
 7 damages in the form of lost payments and potential monetary damages incurred as a
 8 result of the breach. Shed Media would incur non-monetary damages in the form of
 9 injury to its reputation in the entertainment industry. Moreover, any injunction
 10 would have the effect of silencing Shed Media based on Plaintiff's questionable
 11 claims. Depriving Shed Media of its First Amendment rights based on such
 12 unmeritorious claims would result in irreparable injury to Shed Media. Thus, Shed
 13 Media respectfully requests that the Court deny Plaintiff's motion.

14 II. FACTS

15 A. Basketball Wives Los Angeles.

16 The Show is a spinoff of the successful *Basketball Wives* series. The series is
 17 very popular. More than 3.5 million people tuned into the premier of *Basketball*
 18 *Wives 3* on May 30, 2011, more than 350,000 people "like" the series on Facebook,
 19 and more than 250,000 people follow the series on Twitter. [Acord Decl. ¶ 3, Ex. A
 20 at p. 1; Ex. B; Ex. C at 9.]

21 The series typically includes a cast of women, most of whom have or have
 22 had a romantic relationship with a professional basketball player. That said, the
 23 series is in not about basketball, let alone basketball players. It is about the women's
 24 relationships with one another and their lives. [Demyanenko Decl. ¶ 3.] To the
 25 extent that basketball players are mentioned, they are incidental to the series's telling
 26 its women protagonists' stories. [Demyanenko Decl. ¶ 4.] The Show, when it
 27 premiers on August 29, 2011, will follow this precedent, and features Govan, who is
 28

1 Plaintiff's ex-girlfriend and the mother of his children. [Demyanenko Decl. ¶ 6, Ex.
 2 D; Complaint ¶¶ 10-11.]

3 **Promotion Of Basketball Wives: Los Angeles.**

4 As of June 23, 2011, when Plaintiff filed this action, and as of the filing date
 5 of Plaintiff's motion, July 25, 2011, there had been minimal publicity for the Show.
 6 In fact, a single press release was issued before the complaint was filed, and this
 7 press release does not even mention Plaintiff:

8 Elbow throwing, trash talking and in-your-face action: forget the NBA,
 9 we're talking about their wives! . . . "Basketball Wives LA" introduces
 10 a group of dynamic women with relationships to some of the biggest
 11 basketball players in the game. "Basketball Wives LA" cast includes:
 12 Kimsha Artest (wife of Ron Artest, Los Angeles Lakers), Gloria Govan
 13 (fiancée of Matt Barnes, Los Angeles Lakers), **Laura Govan (sister of**
 14 **Gloria Govan)** and Jackie Christie (wife of Doug Christie, former
 15 player for the Los Angeles Clippers) and Imani Showalter (fiancée of
 16 Stephen Jackson, Charlotte Bobcats) as well as others.

17 This 10 episode, hour-long series will dive into the real-life locker
 18 room of these leading ladies, giving viewers a never-before-seen look
 19 at what it takes to live in La La Land and be connected to a famous
 20 professional athlete. For the most part, these women live the life with
 21 the best cars, biggest mansions and hottest bling but living the high life
 22 is not all glamour and often there is a price to pay. Cameras will follow
 23 these women as they attempt to juggle their relationships, infidelity
 24 issues, children and friendships while trying to find the perfect balance
 25 between supporting their families and realizing their own career
 26 ambitions. . . .

27 [Acord Decl. ¶ 9, Ex. D (emphasis added).] Notably, the press release describes
 28 Govan as the "sister of Gloria Govan," not as the ex-girlfriend of Plaintiff or the

1 mother of his children. Another recent press release was issued, which release also
 2 does not mention Gilbert Arenas. [Id.] That said, future promotional materials could
 3 certainly refer to Govan's prior relationship with Plaintiff, and as further set forth
 4 below, such use would fall well within the lines of permissible use. [Id.]

5 **C. Plaintiff's Complaint And Motion For Preliminary Injunction.**

6 Plaintiff complains that Shed Media has infringed his rights in his name and
 7 likeness through the advertising and promotion. Then, in this motion, Plaintiff
 8 impermissibly attempts to enjoin not only the promotion, *but the Show itself*. More
 9 specifically, Plaintiff alleges that he is "a professional athlete" and "one of the most
 10 well-known players in the NBA." [Complaint ¶ 9.] He further claims that by
 11 providing Govan a vehicle by which to discuss *her life*, the Show and Shed Media
 12 enable Govan to use "the names and/or likenesses of famous NBA professional
 13 basketball players they know on a personal level for their own commercial gain."
 14 [Id. ¶ 13.] Plaintiff alleges that Shed Media chose Govan to appear on the Show
 15 "primarily to enhance Defendants' ability to market the show due to Defendant
 16 GOVAN's prior personal relationship with Plaintiff and current relationship with
 17 Plaintiff as mother of the Minor Children, and thus to use Plaintiffs name and/or
 18 likeness for commercial gain. . ." [Id. ¶ 14.]

19 In other words, Plaintiff claims that simply by virtue of Govan's appearance
 20 on the Show—regardless of whether or not his name or likeness is actually used—
 21 Shed Media has violated his rights:

22 While Defendants use care to avoid explicit reference to Plaintiffs
 23 name in the advertisements for the "Basketball Wives: Los Angeles"
 24 show, the very presence of Defendant GOVAN and the title of the
 25 show is an obvious reference to Plaintiff and use of Plaintiff s likeness.
 26 [Complaint ¶ 24.] Plaintiff also alleges "on information and belief" that Shed Media
 27 has "threatened" to use his name or likeness. [Id. ¶ 25.]

1 Plaintiff's Complaint is limited to advertising: "The reference to Plaintiff's
 2 likeness by Defendants is primarily commercial and not communicative and not
 3 transformative, as the challenged uses are Defendants' uses of Plaintiff's likeness in
 4 the ***advertising and the promotion of*** the 'Basketball Wives: Los Angeles' show."
 5 [Complaint ¶ 17 (emphasis added).]

6 Based on Shed Media's use of Govan's name in its advertising and its alleged
 7 "threatened" use of Plaintiff's own name and likeness, Plaintiff attempts to allege
 8 seven claims against Shed Media for: (1) trademark infringement, 15 U.S.C.
 9 § 1125(a), (2) trademark dilution, 15 U.S.C. § 1125(c), (3) false advertising, 15
 10 U.S.C. § 1125(a), (4) false endorsement, 15 U.S.C. § 1125(a), (5) common law
 11 misappropriation of name and likeness, (6) violation of the right of publicity, Cal.
 12 Civ. Code § 3344, and (7) unfair competition, Cal. Bus. & Profs. Code § 17200.

13 Plaintiff filed a motion for preliminary injunction in connection with his first
 14 claim for trademark infringement and his fifth claim for violation of the common
 15 law right of publicity, seeking to enjoin Shed Media from (1) mentioning his name
 16 in connection with the Show—either in advertising or on the Show itself, (2) airing
 17 the Show with Govan in it, or (3) airing any show in which Govan appears along
 18 with other women who are romantically linked to basketball players. In stark
 19 contrast to his Complaint, Plaintiff impermissibly seeks to enjoin advertising ***and***
 20 the Show itself.

21 **D. Plaintiff's Reputation And Publicizing Of The Show.**

22 Plaintiff claims that the Show will somehow injure his reputation and result in
 23 financial injury to him because he will be associated with "cat fights." [Motion
 24 9:20-24.] Plaintiff omits critical facts from his moving papers.

25 First, it is hard to understand how an association with "cat fights" will damage
 26 Plaintiff's reputation, when Plaintiff has been associated with potential gun fights.
 27 More specifically, Plaintiff made national sports headlines—everywhere from the
 28 *New York Post* to the *Los Angeles Times*—last Christmas when he drew a gun on

1 another player in the locker room because of a dispute over gambling debts, and
 2 ultimately pled guilty to gun charges. [Alter Decl. ¶¶ 2, 3, Exs. F, G.]

3 Second, Plaintiff, using his Twitter account, publicizes his private life and
 4 views—which are often crude and/or offensive—on the world stage. For example,
 5 Plaintiff recently made headlines for tweeting while on a blind date. [Alter Decl. ¶¶
 6 4-6, Exs. H-J.] Plaintiff stated, among other things, "Got hooked up on a blind
 7 date..and I guess she was blind when she picked out this outfit ..OMG I thought she
 8 was the queen of ZAMUNDA" and included a photo of his date for the world to see.
 9 [Alter Decl. ¶¶ 11-12, Exs. O, Q .] He also commented about his date's weight and
 10 her eating habits, stating "this dragon can eat" and proclaiming that his date was
 11 "lookin like a thunder cat." [Id.] Plaintiff has further stated on Twitter that he
 12 masturbates before going out clubbing, commented that large groups of women
 13 smell like "fish fillet sandwiches," has made "jokes" about children in special
 14 education, and has posted on his Twitter account a photo of himself peering under
 15 the stall in the women's restroom and photo of a woman posted to look like a penis,
 16 with the logo “Women are Dicks.” [Alter Decl. ¶¶ 11-12, 15, Exs. O-Q, T-V.]

17 Finally, Plaintiff has associated himself with the Show by tweeting about
 18 Govan's appearance on the Show, including the following:

- 19 • "for everybody talkin about my BM [Govan] on that tv show..i dont
 care what she does..if she gets a job i play less money to her(SMART
 THINKER HERE)"
- 20 • "most players dont know that.. 1 they cant lie about u on tv u can sue
 the show 2 if they hav a job it lowers ur pay...so let them work"
- 21 • "Sumbody tell tmz.I care more about watchn ppl plank then my ex on
 tv.PS i almost got away with plankn on the luggage screener at the
 airport"

22 [Alter Decl. ¶¶ 11-12, Exs. P-Q.] In other words, Plaintiff has stated that Govan's
 23 appearance on the Show will benefit him. In a damning admission, between July
 24

1 22, 2011 and July 27, 2011—concurrent with the filing of his motion for
 2 preliminary injunction—***these statements were deleted from his Twitter account.***
 3 [Alter Decl. ¶ 14, Ex. S.]

4 **III. PLAINTIFF'S MOTION SHOULD BE DENIED**

5 **A. Standard For Granting A Motion For Preliminary Injunction.**

6 A preliminary injunction is an "extraordinary remedy" and should not issue as
 7 of right. *Shelton v. National Collegiate Athletic Ass'n*, 539 F.2d 1197, 1199 (9th
 8 Cir. 1976). "A plaintiff seeking a preliminary injunction must establish that he is
 9 likely to succeed on the merits, that he is likely to suffer irreparable harm in the
 10 absence of preliminary relief, that the balance of equities tips in his favor, and that
 11 an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008).

12 **B. The Relief Plaintiff Requests Is Outside The Scope Of His Complaint.**

13 The four corners of a plaintiff's complaint delineate the outer boundaries of
 14 any relief—including injunctive relief—that a plaintiff may obtain. In other words,
 15 an injunction cannot "deal[] with a matter lying wholly outside the issues in the
 16 suit." *De Beers Mines V. United States*, 325 U.S. 212, 220 (1945). Thus, where a
 17 plaintiff seeks injunctive relief based on allegations outside the four corners of his
 18 complaint, the request for injunctive relief should be denied. *See, e.g., Grant v.*
 19 *Callahan*, No. 07-965, 2008 U.S. Dist. LEXIS 95599 (D. Ok. Nov. 24, 2008)
 20 ("Where a movant seeks injunctive relief beyond the claims in a complaint, the
 21 Court has no power to issue a preliminary injunction.").

22 Plaintiff specifically limits his Complaint to advertising and promotion: "The
 23 reference to Plaintiff's likeness by Defendants is primarily commercial and not
 24 communicative and not transformative, as ***the challenged uses are Defendants'***
 25 ***uses of Plaintiff's likeness in the advertising and the promotion of the 'Basketball***
 26 ***Wives: Los Angeles' show.***" [Complaint ¶ 17 (emphasis added).] However, in his
 27 motion, Plaintiff impermissibly seeks broad injunctive relief enjoining Shed Media
 28 from (1) mentioning his name in connection with the Show itself, (2) airing the

1 Show with Govan in it, or (3) airing any show in which Govan appears along with
 2 other women who are romantically linked to basketball players. The language of the
 3 requested injunction seeks relief outside the scope of his Complaint, which alone is
 4 reason to deny his motion.

5 **C. Plaintiff Cannot Establish A Likelihood Of Success On His Claims.**

6 **1. Plaintiff's Right Of Publicity Claim Fails**

7 Plaintiff's right of publicity claim fails because (1) Shed Media has not used
 8 his name, likeness, or identity, (2) Plaintiff has not suffered any injury, and (3) Shed
 9 Media's activities are protected by the First Amendment.

10 **a. Shed Media Has Not Used Plaintiff's Name Or Likeness.**

11 To prevail on a common law right of publicity claim, a plaintiff must
 12 establish: (1) the defendant's use of the plaintiff's identity; (2) the appropriation of
 13 the plaintiff's name or likeness to defendant's advantage; (3) lack of consent; and (4)
 14 resulting injury. *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 408
 15 (2000). Plaintiff cannot prevail on his right of publicity claim because (1) Plaintiff
 16 has not alleged any use of *his*, as opposed to *Govan's*, name or likeness.

17 Plaintiff pleads that "Defendants use care to avoid explicit reference to
 18 Plaintiff's name in the advertisements for the" Show, but nonetheless attempts to
 19 state a claim based on Shed Media's use of *Govan's* name, claiming that the Show's
 20 use of Govan's name, in combination with the title of the Show, "is an obvious
 21 reference to Plaintiff and use of Plaintiff's likeness." [Complaint ¶ 24.] In other
 22 words, Plaintiff claims that he is so famous that any reference to Govan in the
 23 context of a television show amounts to a reference to him and an unlawful
 24 appropriation of his name or likeness. Plaintiff apparently believes that his fame
 25 permits him to prevent Govan from using *her name* in connection with anything—a
 26 television show with the word "basketball" in the title, girls' basketball shoes, or
 27 even basketball shaped cookies—because she used to date him and he is a famous
 28 basketball player. No case—not even *White v. Samsung Electronics America, Inc.*,

1 971 F.2d 1395 (9th Cir. 1992), *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498
 2 F.2d 821, 822 (9th Cir. 1974), or *Carson v. Here's Johnny Portable Toilets, Inc.*,
 3 698 F.2d 831, 837 (6th Cir. 1983), upon which Plaintiff relies and which represent
 4 the outer limits of the common law right of publicity [Motion 6:1-7:12]—supports
 5 the extreme stretch of the law that Plaintiff requests. No reasonable person could
 6 find that the combination of the Show's title and Govan's appearance in the Show
 7 constitutes a misappropriation of Plaintiff's name or likeness, or even his identity. If
 8 anything, the Show represents Govan's right to use *her* identity.

9 Plaintiff's argument that "other media outlets" mentioned Plaintiff's name
 10 when reporting on Govan's appearance in the Show does not change this conclusion.
 11 [Motion 7:25-27.] The fact that third parties referenced the undisputed fact that
 12 Plaintiff is Govan's ex-boyfriend and the father of her children in news stories about
 13 the Show does not mean that *Shed Media* improperly used Plaintiff's name, likeness,
 14 or identity. Thus, Plaintiff's right of publicity claim fails.

15 **b. Plaintiff Has Not Suffered Any Injury As A Result Of Shed**
 16 **Media's Conduct.**

17 Plaintiff himself has admitted that the Show has helped—not harmed—his
 18 interests: "for everybody talkin about my BM [Govan] on that tv show..i dont care
 19 what she does..if she gets a job i play less money to her(SMART THINKER
 20 HERE)." In other words, Govan's appearance on the Show is helpful to Plaintiff
 21 because her making money results in lower child support payments to him.

22 Moreover, Plaintiff cannot seriously contend that the Show "may induce
 23 humiliation, embarrassment and mental distress" because it includes "cat fights."
 24 [Motion 9:13-24.] Plaintiff himself has said that he does not care if Govan appears
 25 on the Show and went as far as to state that the series "makes [him] laugh." [Alter
 26 Decl. ¶¶ 11-12, Exs. P-Q.] Thus, any claim that he is mentally distressed because of
 27 Govan's appearance is unfounded as inconsistent with Plaintiff's public statements.

1 Furthermore, Plaintiff is no choir boy. He brought a gun into the locker room
 2 and pled guilty to gun charges. [Alter Decl. ¶¶ 2-3, Ex. F-G.] He has also
 3 announced to the world that (1) he masturbates before going out clubbing, (2) he
 4 thinks that "500 +girls in one buildin thots gonna smell like FISH FILLET
 5 SANDWICHES", (3) has made a series of "jokes" about special education, and (4)
 6 has posted a photo of himself peering under the stall in the women's restroom and a
 7 photo of a woman posted to look like a penis with a legend stating "Women are
 8 Dicks." Alter Decl. ¶¶ 11-12, 15-16, Exs. O-R, T, U, V.] Against this backdrop, no
 9 reasonable person could find that the fact that Plaintiff's ex-girlfriend appears on the
 10 Show will cause him mental distress or reputational harm. The power of the
 11 statements that appear on Plaintiff's Twitter page is confirmed by the fact that many
 12 of them were deleted concurrently with the filing of this motion. [Alter Decl. ¶¶ 13-
 13 14, Exs. R-S.]¹

14 **c. Plaintiff's Claims Are Barred By The First Amendment.**

15 The California Supreme "Court has acknowledged that 'the right of publicity
 16 has not been held to outweigh the value of free expression. Any other conclusion
 17 would allow reports and commentaries on the thoughts and conduct of public and

18 ¹ Plaintiff cites *Marder v. Lopez*, 450 F.3d 445, 452 (9th Cir. 2006), for the
 19 proposition that Plaintiff is entitled to be compensated for a use of his life story.
 20 [Motion 9:5-19.] *Marder* did not consider whether a person has a right to be
 21 compensated for his or her life story. Rather, it considered the scope and
 22 enforceability of a contract between the plaintiff and a movie studio. Moreover,
 23 cases that have actually considered the issue that Plaintiff raises have emphatically
 24 held that a person does not have an exclusive right in her or her life story. On the
 25 contrary, the courts have long held that there is no right to compensation for one's
 26 life story. See, e.g., *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860
 27 (1979) (no actionable right of publicity claim based on unauthorized biography of
 28 movie star); *Ruffin-Steinbeck v. DePasse*, 267 F.3d 457 (6th Cir. 2001) (no right of
 29 publicity claim based on an unauthorized film about the life of the lead singer of the
 30 Temptations); *Whitehead v. Paramount Pictures Corp.*, 53 F. Supp.2d 38, 53 (D.C.
 31 1999) ("there is no tort for invasion of privacy for appropriating the story of another
 32 person's life."); *Seale v. Gramercy Pictures*, 949 F. Supp. 331, 337 (E.D.Pa. 1996)
 33 ("a public figure has no exclusive rights to his or her own life story, and others need
 34 no consent or permission of the subject to write a biography of a celebrity.").
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 36
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1 prominent persons to be subject to censorship under the guise of preventing the
 2 dissipation of the publicity value of a person's identity.'" *Cher v. Forum Intern.,*
 3 *Ltd.*, 692 F.2d 634, 638 (9th Cir. 1982) (quoting *Gugliemi*, 25 Cal. 3d at 873)). The
 4 First Amendment defense to a right of publicity claim has been described in two
 5 ways: (1) a defense based on the publication of matters in the public interest and (2)
 6 a defense based on the publication of an expressive work. Both of these
 7 formulations apply here, and act to bar Plaintiff's right of publicity claim. Both of
 8 these formulations apply here, and act to bar Plaintiff's right of publicity claim
 9 unless Plaintiff proves that Shed Media acted with actual malice. Plaintiff can make
 10 no such showing here.

11 **(1) The Show Relates To Matters In The Public Interest.**

12 There is an inherent "tension between the broad definition of commercial
 13 appropriation under California law and the values protected by the First
 14 Amendment." *Lee v. Penthouse International, Ltd.*, No. 96-7069, 1997 U.S. Dist.
 15 LEXIS 23893 at *11 (C.D. Cal. March 18, 1997). To resolve this tension, the
 16 California courts have long held that that "[p]ublication of matters in the public
 17 interest, which rests on the right of the public to know and the freedom of the press
 18 to tell it, is not ordinarily actionable." *Dora v. Frontline Video, Inc.*, 15 Cal.App.4th
 19 542 (1993) (internal citations omitted).

20 "[M]atters in the public interest are not restricted to current events; magazines
 21 and books, radio and television may legitimately inform and entertain the public
 22 with the reproduction of past events, travelogues and biographies." *Dora*, 15 Cal.
 23 App. 4th at 543 (internal quotations omitted). The public interest attaches to people,
 24 "who, by their accomplishments, mode of living, professional standing or calling,
 25 create a legitimate and widespread attention to their activities." *Eastwood v.*
 26 *Superior Court*, 149 Cal.App.3d 409, 422 (1983). These people include
 27 "**professional athletes.**" *Gionfriddo*, 94 Cal. App. 4th at 410 (emphasis added).

Moreover, the public interest defense is not limited to the traditional news media. "The California courts have consistently held that newsworthiness is not limited to high-minded discussion of politics and public affairs." *Michaels v. Internet Entertainment Group, Inc.*, No. 98-583, 1998 U.S. Dist. LEXIS 20786 at *12 (C.D. Cal. Sept. 10, 1998). Instead, newsworthiness encompasses publications made purely for "amusement." *Id.* (quoting *Shulman v. Group W Productions, Inc.*, 18 Cal. 4th 200, 225 (1998)). *See also Nichols v. Moore*, 334 F. Supp. 2d 944, 956 (E.D. Mich. 2004) ("The scope of the subject matter which may be considered of 'public interest' or 'newsworthy' has been defined in the most liberal and far-reaching terms. The privilege of enlightening the public . . . extends far beyond to include all types of factual, educational, and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general." (internal citations omitted)). Thus, the Courts have found a wide spectrum of publications—including (1) *Playgirl* magazine, (2) an article in *The Surfer's Journal* about an "iconic figure in the surfing world," (3) an article in *Penthouse* magazine featuring sexually explicit photos of Pamela Anderson of *Baywatch* fame, (4) a tabloid news show also featuring portions of a sex tape of Anderson, and (5) a portion of a reality television show depicting a victim's rights advocate talking to a victim of domestic abuse—to be newsworthy or within the public interest. *See, respectively, Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1098 n. 8 (9th Cir. 2002) ("We do not accept Solano's argument that Playgirl is not a news magazine and thus cannot contain content that may be deemed newsworthy. Even 'vulgar' publications are entitled to such guarantees Courts are, and should be, reluctant to define newsworthiness.") (internal quotations omitted); *Chapman v. Journal Concepts, Inc.*, 528 F. Supp. 2d 1081, 1097-98 (D. Hi. 2007) ("The August/September 2006 volume of *The Surfer's Journal* captures a sliver of the surfing subculture. . . . The published article, photographs, and liner notes are newsworthy and relevant."); *Lee*, 1997 U.S. Dist. LEXIS 23893 at *15 ("the sex life of Tommy Lee and Pamela Anderson Lee is also

1 a legitimate subject for an article by Penthouse"); *Michaels*, 1998 U.S. Dist. LEXIS
 2 20786 at *13 (broadcast of Pamela Anderson sex tape on a tabloid news show was
 3 constitutionally protected because "[i]t is clearly established that the romantic
 4 connections of celebrities are newsworthy, as are business disputes and litigation
 5 arising therefrom"); *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 754 (N.D. Cal. 1993)
 6 (constitutional privilege applies where "Defendants videotaped and broadcast an
 7 actual event that occurred at Plaintiffs' home [counseling of domestic abuse victim].
 8 . . . [W]hile STREET STORIES is not a traditional news show, it is plainly a 'news
 9 or public affairs' broadcast in the broad sense").

10 Against this backdrop, it is clear that the Show is in the public interest and
 11 therefore privileged under the First Amendment. The Show follows the lives of
 12 women who are, or at one point were, romantically connected to basketball players
 13 "as they attempt to juggle their relationships, infidelity issues, children and
 14 friendships while trying to find the perfect balance between supporting their families
 15 and realizing their own career ambitions." [Acord Decl. ¶ 9, Ex. D.] The Show is
 16 thus privileged because professional athletes and the auras and subcultures
 17 surrounding them—including their love lives—are issues of public interest.
 18 *Gionfriddo*, 94 Cal. App. 4th at 410; *Eastwood*, 149 Cal.App.3d at 423.

19 This conclusion is buttressed by the fact that the Show, like the reality
 20 television program at issue in *Baugh*, videotapes and broadcasts actual events that
 21 take place its women protagonists' lives. *Baugh*, 828 F. Supp. at 754. Those
 22 women—including Govan—have a right to tell *their* stories, even if they might
 23 mention the professional athletes with whom they are or once were romantically
 24 connected. Plaintiff does not have the right to prevent Govan from telling her story
 25 simply because he is famous and at one time played a role in her life. Govan has a
 26 constitutional right to tell her story, even if it results in an unauthorized biography of
 27 Plaintiff. *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994) (plaintiff's right of
 28

1 publicity did not override the right of his ex-wife and ex-police partner to tell the
2 story of their undercover work and ultimate drug use and perjury conviction).

3 Plaintiff claims that the Show is not protected by the First Amendment
4 because Plaintiff's "identity is used solely to attract attention to the show, and
5 Plaintiff is not at all related to the show." [Motion 10:16-19.] Plaintiff's argument
6 makes little sense. In a later portion of his brief, Plaintiff states, "Plaintiff's fame
7 and success in his basketball career is also directly related to the 'Basketball Wives'
8 show." [Motion 17:1-4.] Plaintiff cannot have it both ways. Regardless, the Show
9 is about women with romantic connections—past or present—to professional
10 athletes. Plaintiff is admittedly a professional athlete and is Govan's ex-boyfriend
11 and the father of her children. To suggest that the Show is totally unrelated to
12 Plaintiff—as perhaps a documentary about sea creatures would be—is unreasonable.

(2) The Show Is An Expressive Work.

"Under the First Amendment, a cause of action for appropriation of another's name and likeness may not be maintained against expressive works, whether factual or fictional. Whether the publication involved was factual and biographical or fictional, privacy rights have not been held to outweigh the value of free expression." *Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118, 1123 (N.D. Cal. 2002) (internal quotations and citations omitted) (citing *Gugliemi*, 25 Cal. 3d at 871-72). Moreover, it is "beyond dispute" that documentary movies and television—including reality television—are expressive works entitled to First Amendment protection. *Aaronson v. Dog Eat Dog Films*, 738 F. Supp. 2d 1104, 1111 (W.D. Wash. 2010) (citing *Dora*, 15 Cal. App. 4th at 544-46); *Daly*, 238 F. Supp. 2d at 1123 (reality show *Bands on the Run* protected by the First Amendment as an expressive work). The Show—a reality television show—is undeniably an expressive work that is protected by the First Amendment. Thus, and Plaintiff cannot maintain a right of publicity claim against Shed Media based on it.

(3) **Because The Show Is Constitutionally Protected, Related Advertising Is Similarly Protected.**

3 Where an underlying work that makes use of another's name or likeness is
4 entitled to First Amendment protection, advertising for the work is also protected.
5 *See Cher*, 962 F.2d at 638; *Daly*, 238 F. Supp. 2d at 1123; *Gionfriddo*, 94 Cal. App.
6 4th at 414. Just as a plaintiff cannot maintain a cause of action against an expressive
7 work because it is protected by the First Amendment, he cannot maintain a cause of
8 action against advertising for the expressive work. *Cher*, 692 F.2d at 639
9 ("Advertising to promote a news medium, accordingly, is not actionable under an
10 appropriation of publicity theory"); *Daly*, 238 F. Supp. 2d at 1123 ("As *Bands on*
11 *the Run* is an expressive work protected by the First Amendment, plaintiff cannot
12 state a misappropriation claim based on the use of her likeness in the program or the
13 advertisements for the program.").

(4) **Plaintiff Cannot Prove By Clear And Convincing Evidence That Shed Media Acted With Actual Malice.**

Because Plaintiff, allegedly "famous" and a public figure [Complaint ¶ 30], attempts to state a common law right of publicity claim based on advertising and promotion for the Show that is protected by the First Amendment, Plaintiff must prove ***by clear and convincing evidence*** that Shed Media acted with actual malice in advertising the Show. *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664 (2010) ("We conclude a defendant publisher may assert that the actual malice standard applies to claims for commercial misappropriation, whether the claims are brought under the common law or under Civil Code section 3344."); *Hoffman*, 255 F. 3d at 1187 (a plaintiff must prove actual malice by "clear and convincing evidence," which is a "heavy burden, far in excess of the preponderance sufficient for most civil litigation"); *Cher*, 692 F.2d at 639 (defendant not liable for constitutionally protected advertising unless the plaintiff shows that the defendant acted with reckless disregard for the truth). Actual malice

1 does not mean ill will or malice in the ordinary sense of the term. . . .
 2 Actual malice, instead, requires . . . that the statements were made with
 3 a reckless disregard for the truth. And although the concept of reckless
 4 disregard cannot be fully encompassed in one infallible definition, we
 5 have made clear that the defendant must have made [the decision to
 6 publish] with a high degree of awareness of . . . probable falsity, or
 7 must have entertained serious doubts as to the truth of his publication."
 8 *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1251 (9th Cir. 1997) (internal
 9 quotations omitted and alterations in original). Thus, Plaintiff cannot prevail unless
 10 he can prove that Shed Media "knowingly or recklessly falsely claimed that [he]
 11 endorses" the Show. *O'Neil & Co., Inc. v. Validea.com Inc.*, 202 F. Supp. 2d 1113,
 12 1120 (C.D. Cal. 2002).

13 No reasonable person could conclude that the advertising for the Show falsely
 14 claims that Plaintiff endorses the Show simply because Govan appears in the Show,
 15 and might mention him on the Show as her ex-boyfriend and the father of her
 16 children. "Newspapers and magazines commonly use celebrities' names and
 17 photographs without making endorsement contracts, so the public does not infer an
 18 endorsement agreement from the use." *Abdul-Jabbar v. General Motors Corp.*, 85
 19 F.3d 407 (9th Cir. 1996). The same is true of television shows. No reasonable
 20 person would believe that Plaintiff endorses that Show simply because someone
 21 mentions that Govan is Plaintiff's ex-girlfriend and the mother of his children.

22 Plaintiff's claim that the title of the Show—*Basketball Wives*—and Govan's
 23 appearance thereon suggests endorsement by him [Complaint ¶¶ 24, 45] is equally
 24 meritless. Titles do not point to the source or supporter of an expressive work.

25 Consumers expect a title to communicate a message about the book or
 26 movie, but they do not expect it to identify the publisher or producer.
 27 If we see a painting titled 'Campbell's Chicken Noodle Soup,' we're
 28 unlikely to believe that Campbell's has branched into the art business.

1 Nor, upon hearing Janis Joplin croon 'Oh Lord, won't you buy me a
 2 Mercedes-Benz?,' would we suspect that she and the carmaker had
 3 entered into a joint venture. A title tells us something about the
 4 underlying work but seldom speaks to its origin.

5 *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 902 (9th Cir. 2002) (internal
 6 citations omitted). Similarly, a television show called *Basketball Wives* is unlikely
 7 to make anyone believe that Plaintiff has entered into the television business.

8 The fact that no reasonable person could believe that Plaintiff endorses the
 9 Show is especially true in light of Plaintiff's publicly tumultuous relationship with
 10 Govan, which has been covered by media outlets from the *Washington Post* to the
 11 *Chicago Sun Times* to the sports blog www.deadspin.com. For example, it has been
 12 reported that in February 2011, (1) Govan served Plaintiff with child support papers
 13 during half time of a basketball game as he walked into the locker room and (2)
 14 Plaintiff "blasted" Govan on a radio show. [Alter Decl. ¶¶ 7-10, Exs. K-N.] Thus,
 15 anyone who knows enough about Govan to know that she is Plaintiff's ex-girlfriend
 16 would also know that an appearance by Govan does not suggest an endorsement
 17 from Plaintiff. In fact, it more likely suggests the opposite.

18 Plaintiff argues that Shed Media acted with actual malice because
 19 "Defendants' very marketing campaign is premised on delivering a behind-the-
 20 scenes look into Plaintiff's life, even if it is allegedly from Govan's perspective."
 21 [Motion 12:2-4, 12:27-13:5.] For this proposition, Plaintiff cites to the June 22
 22 press release. That press release, however, belies Plaintiff's characterization. It
 23 states that the Show "will dive into the real-life locker room ***of these leading ladies***,
 24 giving viewers a never-before-seen look at what it takes to live in La La Land and
 25 be connected to a famous professional athlete. . . . ***Cameras will follow these***
 26 ***women*** as they attempt to juggle their relationships, infidelity issues, children and
 27 friendships while trying to find the perfect balance between supporting their families
 28 and realizing their own career ambitions." [cite (emphasis added).] In other words,

1 the press release makes clear that the Show is about the *women*, not the athletes.
 2 Plaintiff cannot meet his burden to prove by *clear and convincing evidence* that
 3 Shed Media acted with actual malice simply by pointing to—and twisting—a single
 4 press release. Thus, his right of publicity claim necessarily fails.

5 **2. Plaintiff's Trademark Infringement Claim Fails.**

6 To state a claim for trademark infringement in violation of 15 U.S.C.
 7 § 1125(a),² Plaintiff must prove that: (1) he owns a mark; (2) he used the mark prior
 8 to Shed Media's alleged use; (3) Shed Media used the allegedly infringing mark in
 9 interstate commerce without his consent; and (4) Shed Media's use is likely to cause
 10 consumer confusion. *See, e.g., Century 21 Real Estate v. Sandlin*, 846 F.2d 1175,
 11 1178 (9th Cir. 1998). Plaintiff's claim fails because (1) he has not pointed to any
 12 confusingly similar mark used by Shed Media, (2) any alleged use of his marks by
 13 Shed Media is a nominative fair use, and (3) Plaintiff's claims are barred by the First
 14 Amendment.

15 **a. Plaintiff Has Not Pointed To Any Confusingly Similar Mark.**

16 The third element of a claim for trademark infringement is the defendant's use
 17 of an infringing mark in interstate commerce. Plaintiff skips this step, and goes
 18 straight to the fourth step, likelihood of confusion. Plaintiff has failed to explain a
 19 fundamental element of his claim—*i.e.*, what mark Shed Media has used that is
 20 confusingly similar to his marks. In other words, argues that Shed Media uses a
 21 mark that is confusingly similar to his trademarks in his name and likeness but never
 22 identifies the marks that he claims Shed Media is using.

23 Plaintiff does this because identifying the "marks" at issue would highlight
 24 the absurdity of his claim. Plaintiff argues that "while Defendants so far have made
 25 no explicit mention of Plaintiff's name, Defendants have clearly used Plaintiff's

26 ² Plaintiff has attempted to state three distinct claims for violation of § 1125(a): (1)
 27 trademark infringement, (2) false advertising, and (3) false endorsement. Only the
 28 trademark infringement claim is at issue in this motion.

1 identity" because Govan, Plaintiff's ex-girlfriend and the mother of his children,
 2 appears of the Show. [Motion 17:5-8.] In other words, the allegedly infringing
 3 "marks" are "Laura Govan" and "Basketball Wives." Conducting the likelihood of
 4 confusion analysis with these marks dooms Plaintiff claim to failure.

5 "Where. . . two marks are entirely dissimilar, there is no likelihood of
 6 confusion. . . . Nothing further need be said." *Brookfield Comm'n's v. West Coast*
 7 *Ent.*, 174 F.3d 1036, 1054 (9th Cir. 1999). *See also Pirone v. Macmillan, Inc.*, 894
 8 F.2d 579 (2nd Cir. 1990) (applying the rule stated in *Brookfield* in the celebrity
 9 context). The marks that Shed Media allegedly uses—"Laura Govan" and
 10 "Basketball Wives"—are entirely dissimilar from Plaintiff's alleged marks. Thus,
 11 Plaintiff's trademark infringement claim must fail.

12 **b. The Nominative Fair Use Doctrine Bars Plaintiff's Claim.**

13 Where a defendant uses a plaintiff's mark "to describe the plaintiff's product,"
 14 courts apply a nominative fair use analysis that does not follow the traditional
 15 likelihood of confusion analysis because such use "lies outside the strictures of
 16 trademark law" in that "it does not implicate the source-identification function."
 17 *New Kids on the Block*, 971 F.2d 302, 308 (9th Cir. 1992) (nominative use for the
 18 defendant newspapers to use the trademark "New Kids on the Block" to describe the
 19 band). *See also Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1151 (9th Cir. 2002).

20 The nominative fair use defense applies where three elements are met:
 21 First, the [plaintiff's] product or service in question must be one not
 22 readily identifiable without use of the trademark; second, only so much
 23 of the mark or marks may be used as is reasonably necessary to identify
 24 the [plaintiff's] product or service; and third, the user must do nothing
 25 that would, in conjunction with the mark, suggest sponsorship or
 26 endorsement by the trademark holder.

27 971 F.2d at 308. Shed Media easily meets this test.
 28

1 First, there is no reasonable way to refer to Plaintiff without using his name.
 2 "When an individual obtains a service mark in his own proper name, it becomes
 3 difficult, if not impossible, to refer to the individual without using his or her
 4 trademarked name." *Dick Clark v. America Online, Inc.*, 2000 U.S. Dist. LEXIS
 5 17368 at *16 (C.D. Cal. Nov 30, 2000). In such a circumstance, "allowing the
 6 trademark holder exclusive rights would allow the language to 'be depleted in much
 7 the same way as if generic words were protectable.'" *Playboy Enterprises, Inc. v.*
 8 *Welles*, 279 F.3d 796, 802 (9th Cir. 2002) (quoting *New Kids*, 971 F.2d at 306).

9 Second, although Shed Media does not currently use Plaintiff's name, if and
 10 when it does, it will use Plaintiff's name only as necessary to refer to *Plaintiff* in the
 11 context of telling its story about its women protagonists. It will not, for example, do
 12 what the Ninth Circuit found to be objectionable in *Playboy Enterprises* and
 13 wallpaper the background of a scene with the words "Gilbert Arenas" repeated over
 14 and over, nor will it promote the Show as "Gilbert Arenas's *Basketball Wives: Los*
 15 *Angeles*." See *Playboy Enterprises*, 279 F.3d at 804 (holding that "[t]he repeated
 16 depiction of 'PMOY '81'" as the wallpaper for the defendant's website was not
 17 necessary to describe" her as a former "Playmate of the Year").

18 Finally, such use of Plaintiff's name and/or likeness would in no way support
 19 sponsorship or endorsement by Plaintiff, but rather would be incidental to the telling
 20 of Govan's story. As explained in Section III(C)(1)(c)(4), *supra*, given the publicly
 21 tumultuous nature of Plaintiff's relationship with Govan, no reasonable person
 22 would believe that the fact that Govan appears on the Show means that Plaintiff
 23 endorses it.³ Because all three factors apply here, the nominative fair use defense
 24 bars Plaintiff's trademark infringement claim.

25 ³ Plaintiff does not dispute that the first two elements of the nominative fair use test
 26 are met here. Instead, he claims, much like he did in connection with the actual
 27 malice analysis, *supra*, that Shed Media somehow suggests that Plaintiff endorses
 28 the Show. Because Plaintiff's argument is identical to his actual malice argument,
 Shed Media, for simplicity's sake, does not address it again here.

1 **c. Plaintiff's Claim Is Barred By The First Amendment.**

2 The First Amendment defense applies equally to Plaintiff's trademark
 3 infringement claim as it does to Plaintiff's right of publicity claim. *E.S.S. Enter't
 4 2000 v. Rock Star*, 547 F.3d 1095, 1101 (9th Cir. 2008). Thus, for the same reasons
 5 asserted in section III(C)(1)(c), *supra*, Plaintiff's trademark infringement claim fails.
 6 Briefly, in *Mattel, Inc.*, the Ninth Circuit held that courts must "construe the Lanham
 7 Act to apply to artistic works *only* where the public interest in avoiding consumer
 8 confusion *outweighs* the public interest in free expression." *Mattel Inc. v. Walking
 9 Mountain Prods.*, 353 F.3d 792, 807 (9th Cir. 2003) (emphasis in the original and
 10 internal quotations omitted).⁴ An expressive work's use of a trademark is not
 11 actionable (1) "unless the [use of the mark] has no artistic relevance to the
 12 underlying work whatsoever"; or (2) "if it has some artistic relevance, unless [it]
 13 explicitly misleads as to the source or the content of the work." *Mattel, Inc.* 296
 14 F.3d at 902 (internal quotations omitted).

15 Both of these elements are clearly met here. First, the "no relevance"
 16 standard is to be taken literally such that the "level of relevance merely must be
 17 above zero." *Rock Star*, 547 F.3d at 1100. An allegedly infringing work need not
 18 be "about" the alleged trademark in order to surpass this low threshold. *Id.* As
 19 discussed in Section III(C)(1)(c)(1), the Show does relate to Plaintiff, and certainly
 20 meets the low "no relevance" standard. Second, as explained Section
 21 III(C)(1)(c)(4), no reasonable person could find that the Show misleads viewers into
 22 believe that Plaintiff is its source or sponsor. Thus, Plaintiff's trademark
 23 infringement claim is barred by the First Amendment.

24 **D. Plaintiff Cannot Establish That He Will Be Irreparably Harmed.**

25
 26 ⁴ While *MCA Records* dealt with the use of a trademark in the title of a work, its
 27 analysis applies equally to "to the use of a trademark in the body of the work." *Rock
 28 Star*, 547 F.3d at 1099.

"Under *Winter*, plaintiffs must establish that irreparable harm is likely, not just possible." *Alliance For The Wild Rockies v. Cottrell*, 632 F.3d, 1127 1131 (9th Cir. 2011). Plaintiff does not present any evidence of actual or likely harm. Instead, Plaintiff argues, citing *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 729 (S.D.N.Y. 1978), that irreparable harm is likely because he "is deprived of his sole right to exploit his property interest in his identity", will suffer "reputational harm", and "damages would be difficult" to calculate. [Motion 15:3-7.] In other words, Plaintiff asks this Court to presume irreparable harm. Plaintiff can not rely on such a presumption after *Winter*. See, e.g., *Kerr Corp. v. North Am. Dental Wholesalers, Inc.*, No. 11-0313, 2011 U.S. Dist. LEXIS 61779 at *6 (C.D. Cal. June 9, 2011) ("Kerr nonetheless demonstrates only a minimal effort to demonstrate irreparable harm, relying heavily on the idea that a plaintiff who demonstrates a likelihood of success on the merits of a trademark infringement claim is entitled to a presumption of irreparable harm. This standard, however, no longer applies in light of the *Winter* case. . . ." (internal citations omitted)).

Moreover, even if such a presumption were applicable here, it is easily rebutted for the same reason that Plaintiff cannot prove damages as an element of his right of publicity claim. He explicitly admits that Govan's appearance on the Show is to his benefit and states that the series "makes [him] laugh." [Alter Decl. ¶¶ 11-12, Exs. P-Q.] Thus, any claim of irreparable harm is directly contrary to Plaintiff's previous public statements.

E. The Balance Of The Hardships Favors Shed Media.

Plaintiff has admitted that there is no harm to him from Govan's appearance on the show, and, in fact, that the Show will actually benefit him by reducing the support payments that he must make to Govan. [Alter Decl. ¶¶ 11-12, Exs. P-Q.] By contrast, Shed Media will be severely injured if an injunction issues.

First, Shed Media will be faced with extreme economic harm and reputational injury. VH1 would likely claim that Shed Media would be in breach of its

1 agreement to timely deliver the Show. Such a breach could result in severe
 2 monetary losses to Shed Media in the form of lost payments and potential monetary
 3 damages caused as a result of the breach, including lost advertising revenues, and
 4 non-monetary losses in the form of loss of reputation in the industry. [Helberg Decl.
 5 ¶¶ 3-5]

6 Second, Plaintiff seeks a broad injunction silencing Shed Media based on
 7 claims that have a minute, if any, chance of success. Permitting Plaintiff to curtail
 8 Shed Media's First Amendment rights based on such questionable claims would
 9 result in undeniable injury to Shed Media. "Loss of First Amendment freedoms,
 10 even for minimal periods of time, unquestionably constitutes irreparable injury."
 11 *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

12 Third, Plaintiff ignores the fact that the injunction he seeks would likely harm
 13 non-parties to this lawsuit. Were an injunction to issue, VH1, upon which the Show
 14 will air, would likely claim harm on the grounds that it will lose advertising revenue
 15 and because its First Amendment rights will be curtailed, much like Shed Media's.
 16 [Helberg Decl. ¶¶ 3-4] Weighing the potential financial and First Amendment
 17 injuries to Shed Media and non-party VH1 (and the fact that Plaintiff has admitted
 18 that airing the Show is good for him) counsels against issuing an injunction.

19 **IV. CONCLUSION**

20 For the reasons explained above, Shed Media respectfully requests that the
 21 Court deny Plaintiff's motion for preliminary injunction.

22 Dated: August 2, 2011

23 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

25 By _____ /s James E. Curry
 26 _____ JAMES E. CURRY

27 Attorneys for Defendant
 28 SHEA MEDIA US INC.